No. 17-2

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR IRELAND AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICUS CURIAE[1]

Ireland is an internationally-recognized sovereign nation state. The United States recognizes and maintains diplomatic relations with Ireland.

The warrant under appeal orders Respondent to produce in the United States documents that it maintains reside in Ireland. Ireland has a genuine and legitimate interest in potential infringements by other states of its sovereign rights with respect to its jurisdiction over its sovereign territory.

Ireland files this *amicus curiae* brief with the consent of both parties, as evidenced by blanket letters of consent filed with this Court on November 9, 2017.

SUMMARY OF THE ARGUMENT

The subject of this appeal is a judgment of the United States Court of Appeals for the Second Circuit decided July 14, 2016: *In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation*, 829 F.3d 197 (2016), *rehearing en banc denied*, 855 F.3d 53 (2d Cir. 2017). Ireland respectfully makes three points in this amicus brief.

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1. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *amicus curiae* states that: a) this brief was not authored, in whole or in part, by counsel for a party; b) neither a party nor a party's counsel made a monetary contribution that was intended to fund preparing or submitting this brief; and c) no person – other than the *amicus curiae* or its counsel – made a monetary contribution that was intended to fund preparing or submitting this brief.

First, Ireland does not accept any implication that it is required to intervene into foreign court proceedings to protect its sovereignty.

Second, Ireland continues to facilitate cooperation with other states, including the United States, in the fight against crime. Indeed, Ireland and the United States are already parties to a treaty addressing the subject of this appeal, namely the Treaty between the Government of Ireland and the Government of the United States of America on Mutual Legal Assistance done on January 18, 2001 ("MLAT"). Ireland therefore considers that the procedures provided for in the MLAT represent the most appropriate means to address requests such as those which are the object of the warrant in question.

Third, Ireland notes that no party below cited or argued the Supreme Court of Ireland case of *Walsh v National Irish Bank* [2013] 1ESC 2, which may be relevant to the subject of the appeal.

ARGUMENT

I. National Sovereignty Is Never Waived By Non-Intervention in Foreign Domestic Court Proceedings

The implication of Petitioner's argument is that any conflict between United States and Irish law is speculative unless Ireland actively asserts it within United States legal proceedings. Ireland does not accept any implication that it is required to intervene into foreign court proceedings to protect its sovereign rights in respect of its jurisdiction, or that Ireland not intervening is evidence

of consent to a potential infringement thereof. Ireland respectfully asserts that foreign courts are obliged to respect Irish sovereignty (and that of all other sovereign states) whether or not Ireland is a party or intervener in the proceedings before them. *See, e.g.*, Restatement (Third) of The Foreign Relations Law of the United States § 442(2) (1987) (describing appropriate deference to conflicts in disclosure law between sovereign states). In determining its view on this matter, the Supreme Court should consider whether its decision may conflict with either Irish and/or EU law.

II. Ireland Is Willing To Apply The MLAT Process To This Warrant

Ireland continues to facilitate cooperation with other states, including the United States, in the fight against crime and, in this regard, has enacted legislation giving effect to a large number of international treaties and instruments providing for mutual legal assistance in criminal matters. As noted by both the parties and other *amici* in the Court of Appeals for the Second Circuit, and as referenced above, Ireland and the United States are already parties to a Treaty (the MLAT) addressing the subject of this appeal. Ireland therefore considers that the procedures provided for in that Treaty represent the appropriate means to address requests such as those which are the object of the warrant in this case. Accordingly, Ireland remains ready to consider, as expeditiously as possible, a request under that Treaty, if and when it be made.[2]

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2. The law enabling Ireland to provide mutual legal assistance to, and seek mutual legal assistance from, other

countries is contained in the Criminal Justice (Mutual Assistance) Act of 2008. In brief, the Act primarily includes provisions:

- relating to the sharing of information and monitoring of financial transactions for criminal investigation purposes;
- enabling the enforcement in Ireland of orders for the freezing and confiscation of property that could be evidence or the proceeds of crime;
- permitting the Minister to request an Irish court to take evidence for use in criminal proceedings or a criminal investigation in another country;
- enabling the transfer of a prisoner to give evidence or assist a criminal investigation in Ireland and enabling the transfer of a prisoner to give evidence or assist an investigation outside Ireland;
- enabling the Minister to request an Irish court to summon a witness to give evidence for use outside Ireland by a television link or telephone link;
- permitting the taking of identification evidence in Ireland for use in criminal proceedings or criminal investigations outside Ireland;
- empowering the Minister to cause a document requiring a person to appear as a defendant or witness in criminal proceedings in another country or any other document issued by a court or authority in another country in relation to criminal proceedings to be served on the person in Ireland;
- providing for a request from other countries for the examination of an object or site in Ireland for such purposes to be complied with;
- enabling requests for the restitution of stolen property to be made to other countries and such requests to be made to Ireland; and,

III. The Supreme Court of Ireland case of *Walsh v National Irish Bank* [2013] 1ESC 2

It is incumbent on Ireland to acknowledge that the Supreme Court of Ireland did make an order in the case of *Walsh v National Irish Bank* [2013] 1ESC 2,[3] which may be of some relevance to the proceedings before this Court. In *Walsh*, the taxation authorities in Ireland (the Revenue Commissioners) applied under section 908 of the Taxes Consolidation Act 1997 for an order for disclosure of details of an account with the National Irish Bank. *Id.* at ¶ 1.2. The branch in question was situated outside Ireland (in the Isle of Man, which is a British crown dependency). *Id.* at ¶ 2.3. The High Court (the trial-level court) refused the order on the grounds that this is a matter for the courts of the Isle of Man. *Id.* at ¶¶ 4.1-4.5.

The Supreme Court of Ireland held that, *in the absence of alternative means* of obtaining information required for a criminal or similar investigation, there may be circumstances in which an Irish court would order the production of records from an Irish entity on foreign soil, but would do so only after being competently apprised of

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- enabling representatives of other countries to be present at the execution of a request in Ireland and enabling members of the Garda Síochána (Irish police) to be present at the execution of a request in other countries.

See Criminal Justice (Mutual Assistance) Act of 2008, No. 7 of 2008, *available at* http://www.irishstatutebook.ie/2008/en/act/pub/0007/index.html.

3. The *Walsh* decision is available at http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/eafa348512d6d95a80257afe00587a09?OpenDocument).

whether the execution of the order would violate the law of the foreign sovereign. *Id.* at ¶¶ 7.6, 9.3-9.6. A significant factor in the case was that the branch did not have a separate corporate identity:

> ***The fact is that the Bank chose to conduct its business (or at least part of it) in the Isle of Man by means of a branch rather than by means of a separate legal entity incorporated in the Isle of Man and operating as part of the same group of companies. Doubtless, there were good reasons for the Bank choosing so to do. However, such choices have consequences.*** The fact remains that the same legal entity was doing business in the Isle of Man through one of its branches as did business through its ordinary branch network in Ireland. The banking obligations undertaken through the Isle of Man branch (such as the obligation to repay monies deposited) were obligations of the Bank in just the same way as obligations undertaken through a branch in Dublin or elsewhere in Ireland.

Id. at ¶ 5.6 (emphasis added).

As noted above, there is a Treaty in place between the United States and Ireland which addresses the subject of the appeal.

In *Walsh*, the Irish Supreme Court accepted that, in general, a court does not order inspection of documents in a foreign country and that, where possible, courts should avoid coming into conflict. However, on the central point

of whether it had power to order production of documents by an Irish registered company by one of its branches situated in a foreign country, the Supreme Court found that it did. The Supreme Court found that the Taxes Consolidation Act empowers the Irish taxation authorities to seek an order that an Irish bank produce records of accounts held by its customers wherever the information is situated.

It appears that in certain circumstances, an Irish court is prepared to order the disclosure by an Irish corporation of information in its possession, notwithstanding that the information is physically located in another jurisdiction, provided certain matters are demonstrated.

CONCLUSION

Ireland does not accept any implication that it is required to intervene into foreign court proceedings to protect its sovereignty. Ireland continues to facilitate cooperation with other states, including the United States, in the fight against crime and is ready to consider, as expeditiously as possible, a request under the MLAT, if and when it be made. Finally, in the absence of any obvious error in the interpretation of the Court of Appeals for the Second Circuit, Ireland would propose that the judgment be affirmed.

Respectfully Submitted,

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